

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
April 25, 2011 Session

MAXINE WATLEY v. WHIRLPOOL CORPORATION ET AL.

**Appeal from the Circuit Court for Rutherford County
No. 56935 Royce Taylor, Judge**

**No. M2010-02125-WC-R3-WC - Mailed - August 8, 2011
Filed - September 8, 2011**

In this workers' compensation case, the employee injured her lower back at work in May 2006. She received medical treatment for a short period of time and was then released by her doctor. In July 2007, she consulted a neurosurgeon for continuing lower back pain. Around the same time, she accepted a voluntary layoff from her employer, then retired. She later had two surgeries on her lower back: a discectomy in October 2007, and a fusion in April 2008. She filed this action, alleging that the surgeries and resulting disability were caused by her employment. Her employer denied the claim. The trial court found that the October 2007 surgery was caused by her May 2006 injury, but the April 2008 surgery was not. It further found that her award of permanent disability benefits was "capped" at one and one-half times her anatomical impairment due to her voluntary retirement. Her employer has appealed, contending that the trial court erred by finding her claim was not barred by the statute of limitations, and by using an incorrect impairment rating as the basis of its award. Employee contends that the trial court erred by failing to find that she was permanently and totally disabled.¹ We affirm the judgment.

**Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right; Judgment of the Circuit
Court Affirmed**

Donald P. Harris, Sr. J., delivered the opinion of the Court, in which CORNELIA A. CLARK, C.J., and E. RILEY ANDERSON, SP. J., joined.

David T. Hooper, Brentwood, Tennessee, for the appellant, Whirlpool Corporation.

¹Pursuant to Tennessee Supreme Court Rule 51, this workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law.

Robert E. Cooper, Jr., Attorney General and Reporter; and Joshua Davis Baker, Assistant Attorney General, for the appellee, Tennessee Department of Labor and Workforce Development, Second Injury Fund.

Monica Mayo-Grinder, Nashville, Tennessee, for the appellee, Maxine Watley.

MEMORANDUM OPINION

Factual and Procedural Background

The employee, Maxine Watley, was sixty-two years old at the time of the trial of this case. She was hired by Whirlpool Corporation (“Whirlpool”), an appliance manufacturer, in 1989 and retired from that job in August 2007. She had an eighth-grade education and her prior employment experience was as a nurse’s aide, small press operator and janitor. Her work for Whirlpool was primarily as a production worker, assembling air conditioners. She injured her back on May 26, 2006, while lifting an air conditioner coil. She reported the injury on May 31. She was treated at Whirlpool’s onsite medical facility that day and on several days thereafter. She testified that she also went to a local emergency room on June 1. No record of this visit is contained in the record. She was seen at Tennessee Urgent Care Associates on June 7, 2006. She was referred by Whirlpool to Dr. Frank Thomas, an occupational medicine specialist, who first saw her on June 15, 2006. Dr. Thomas ordered physical therapy and gave her an injection. He released her with no impairment or restrictions on July 19, 2006. She continued to work while receiving medical treatment and thereafter until her retirement.

Ms. Watley testified that, although she continued to work after July 2006, her back pain worsened. Whirlpool’s records indicate that she did not receive additional treatment for her back from the onsite medical facility after being released by Dr. Thomas. On April 20, 2007, she consulted her personal physician, Dr. Joseph Scott, for several problems including low back pain. On July 3, 2007, she consulted him again. On this occasion, her chief complaint was low back pain. He ordered an MRI of her lumbar spine, which revealed a potential disc herniation at the lowest level of the spine.² He referred her to Dr. Michael Moran, a neurosurgeon, for further treatment and evaluation.

Dr. Moran testified by deposition. He first examined Ms. Watley on July 23, 2007. She gave him a history of one year of back pain and left leg pain. His diagnosis was a

²There is some uncertainty in the record about whether Ms. Watley has an extra lumbar vertebra. Thus, the level of the defect is sometimes referred to as L6-S1 and elsewhere referred to as L5-S1. For consistency, the injured area is referred to as L5-S1 throughout this opinion.

recurrent central disc herniation at the L5-S1 level.³ He recommended nonsurgical management, consisting of physical therapy and epidural steroid injections. When these measures did not improve her condition, Ms. Watley elected to have surgery, a procedure described by Dr. Moran as “redo discectomy.” This surgery was performed on October 31, 2007. Dr. Moran testified that during the procedure he found “chronically calcified” disc material that, in his opinion, had developed slowly over a period of years.

Ms. Watley initially reported “remarkabl[e]” improvement after the surgery. She returned to Dr. Moran on February 11, 2008, however, complaining of pain in her back and right leg. She reported to him that her right leg pain had started about one month earlier. Dr. Moran recommended a trial of physical therapy, home exercises and injections to treat these symptoms. After conservative treatment did not improve her condition, Dr. Moran offered to perform a surgical fusion of the L5 and S1 joints in an attempt to correct her problems. This surgery took place on April 29, 2008, but, according to Dr. Moran, Ms. Watley continued to have back and right leg pain. He ultimately referred her to a pain specialist. Dr. Moran was of the opinion that Ms. Watley’s back and leg symptoms were the result of chronic degenerative changes in the spine. He agreed, however, that an incident such as the May 26, 2006 event could have aggravated Ms. Watley’s underlying chronic condition so as to cause the need for the October 2007 surgery. He considered it “a stretch” to find a causal relationship between the May 2006 event and the April 2008 surgery. Dr. Moran also testified that he did not assign any formal work restrictions to Ms. Watley after the April 2008 surgery because he did not “think she would be very employable at all.”

By that time, Ms. Watley was no longer working. In or near July 2007, Whirlpool eliminated some assembly lines in its plant. Ms. Watley was eligible for reassignment to an area known as the BIR (for Built-in Refrigerator) line. She declined to accept the assignment because she did not think she could perform the job. Shortly thereafter, she applied for retirement benefits. Dr. Moran’s note of his August 24, 2007 appointment states Ms. Watley “has had to quit her job today and take an early retirement. This is because of severe lumbar pain.” Ms. Watley officially retired on August 31, 2007, and began receiving retirement benefits on November 1, 2007. She has not worked or sought employment since that time.

Dr. David Gaw, an orthopedic surgeon, examined Ms. Watley on February 12, 2009 at the request of her attorney. He testified by deposition and stated his opinion that Ms. Watley retained an anatomical impairment of 14% to the body as a whole as a result of the May 2006 injury and the October 2007 and April 2008 surgeries. He calculated the impairment using the Fifth Edition of the AMA Guides to the Evaluation of Permanent Impairment, which was in effect on the date of her injury. Dr. Gaw testified that because of

³In 1996, Ms. Watley had surgery to repair a disc herniation at the same level of the spine.

Ms. Watley's 1996 surgery at the same level of her spine, the Guides directed that the range of motion method should be used to assign impairment for the 2007 and 2008 surgeries. Applying that method, he found that she had a 2% impairment for the October 2007 surgery, a 3% impairment for the April 2008 surgery, and a 9% impairment due to diminished range of motion. He did not apportion the range of motion impairment between the 2007 and 2008 surgeries, but did state that "the vast majority would have been following the fusion." He also stated that she had a "less than 1% chance of ever returning to work."

Concerning causation, Dr. Gaw believed that the May 26, 2006 incident had aggravated Ms. Watley's underlying degenerative spinal condition and brought about the need for both of Dr. Moran's surgeries. Based upon the history given to him by Ms. Watley, Dr. Gaw incorrectly understood that she had not returned to work after the date of her injury. When given a corrected history, he did not change his opinion.

Doug Hagewood, Whirlpool's Human Resources Manager, testified that Ms. Watley had been offered the opportunity to work on the BIR line, but had chosen a voluntary layoff instead. He also said that, according to the documents filed by Ms. Watley, her retirement was voluntary. As custodian of Whirlpool's records, he testified that the last medical treatment she had received for her May 26, 2006 back injury was her July 19, 2006 appointment with Dr. Thomas. A listing of medical payments made by Whirlpool was introduced through Mr. Hagewood. According to that document, the last payment made to Dr. Thomas's practice, Tennessee Urgent Care Associates, was on August 7, 2007, for a service date of June 7, 2006. The same list contains an October 26, 2006 payment to a Dr. Phillip Newman for a service date of June 1, 2006.

Ms. Watley filed a request for benefit review conference on October 15, 2007. That document alleged that she had sustained a gradual injury to her back and that her date of injury was August 24, 2007, the last day she had worked for Whirlpool. A benefit review conference was held on April 7, 2008, but no agreement was reached. Ms. Watley filed this action on the same day. Her complaint alleged an April 2007 injury, "with further exacerbations in June and July 2007." In the alternative, she alleged a gradual injury. Whirlpool answered the complaint, denied that an injury occurred as described, and alleged her claim was barred by the statute of limitations. In January 2009, an agreed order was entered permitting Ms. Watley to amend her complaint to allege an injury on May 26, 2006.

The trial was held on April 12, 2010. The court, ruling from the bench, found that the statute of limitations began to run at the time of the August 7, 2007 payment to Tennessee Urgent Care Associates. It further held that the amendment to the complaint which added the May 26, 2006 injury date related back to the date the initial complaint was filed—April 7, 2008. On those bases it found that the complaint was not barred by the statute of

limitations. The court held that the May 26 event was a compensable aggravation of Ms. Watley's pre-existing degenerative disease. It found that this injury caused the need for Dr. Moran's October 2007 surgery, but was not the cause of the April 2008 surgery. Using Dr. Gaw's impairment rating of 14% to the body as a whole as a starting point, the court deducted the 3% impairment arising from the April 2008 surgery, resulting in an 11% impairment to the body as a whole. It determined that Ms. Watley had voluntarily retired, and her award of benefits was therefore subject to the one and one-half times impairment "cap" contained in Tennessee Code Annotated section 50-6-241(d)(1)(A) (2008 & Supp. 2010). It awarded 16.5% permanent partial disability benefits, ordered Whirlpool to hold Ms. Watley harmless for all medical expenses associated with the October 2007 surgery and dismissed all claims against the Second Injury Fund. Judgment was entered in accordance with the trial court's ruling. Whirlpool has appealed, contending that the trial court erred by finding that the claim was not barred by the statute of limitations, and by using Dr. Gaw's range of motion impairment to determine the permanent partial disability award. Ms. Watley has raised a separate issue, arguing that the trial court erred by applying the one and one-half times impairment cap to her award.

Standard of Review

A trial court's findings of fact are reviewed "de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. Code Ann. § 50-6-225(e)(2) (2008). This standard requires the reviewing court "'to examine, in depth, a trial court's factual findings and conclusions.'" Crew v. First Source Furniture Grp., 259 S.W.3d 656, 664 (Tenn. 2008) (quoting Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991)). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. Madden v. Holland Grp. of Tenn., Inc., 277 S.W.3d 896, 900 (Tenn. 2009). "When the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues." Foreman v. Automatic Sys., Inc., 272 S.W.3d 560, 571 (Tenn. 2008). The trial court's conclusions of law are reviewed de novo with no presumption of correctness. Wilhelm v. Krogers, 235 S.W.3d 122, 126 (Tenn. 2007).

Analysis

Statute of Limitations

Whirlpool argues that Ms. Watley's claim was barred by the applicable statute of limitations. See Tenn. Code Ann. § 50-6-203(b)(2) (2008). It makes two assertions in support of that argument. First, it asserts that her request for a benefit review conference, filed on October 15, 2007, was fatally flawed because it alleged a gradual injury with a last day worked of August 24, 2007, rather than an acute injury occurring on May 26, 2006. Second, it asserts that her April 7, 2008 civil complaint was not filed within one year of the date of her last authorized medical treatment (July 19, 2006) and therefore the January 2009 amendment to the complaint did not cure the untimely filing.

In response, Ms. Watley argues that the limitation period began to run on August 7, 2007, when Whirlpool made a payment to Tennessee Urgent Care Associates for services rendered on June 7, 2006. On that basis, she contends that the October 15, 2007 benefit review conference request was timely. We agree. Tennessee Code Annotated section 50-6-203 provides:

(b)(2) In those instances where the employer has paid workers' compensation benefits, either voluntarily or as a result of an order to do so, within one (1) year following the accident resulting in injury, the right to compensation is forever barred, unless a form prescribed by the commissioner requesting a benefit review conference is filed with the division within one (1) year from the latter of the date of the last authorized treatment or the time the employer ceased to make payments of compensation to or on behalf of the employee.

(c) For purposes of this section, *the issuing date of the last payment of compensation by the employer*, not the date of its receipt, shall constitute the time the employer ceased making payments and an employer or its insurer shall provide the date on request.

Tenn. Code Ann. § 50-6-203(b)(2) & (c) (2008) (emphasis added).

Whirlpool's records show that payments were made on October 26, 2006 and August 7, 2007 for services rendered on June 1 and June 7, 2006, respectively. Ms. Watley's benefit review conference request was clearly filed within one year of either payment date.

Citing Dye v. Witco Corp., 216 S.W.3d 317 (Tenn. 2007), Whirlpool argues that because it delayed payment for over a year between the final medical treatment on July 19,

2006 and the August 2007 payment, the limitation period expired. In Dye, the employer made a payment in October 1999 for medical treatment provided in July 1999. Id. at 320. The employee returned to the doctor in March 2002, and his employer paid for that treatment in October 2002. Id. The Supreme Court held the limitation period had expired one year after the October 1999 payment, and the subsequent voluntary payment did not revive the employee's cause of action. Id. at 322. In our view, Dye does not support Whirlpool's position. In that case, the statute began to run on the date of the last payment for medical treatment, which occurred three months after treatment. In this case, the payment was made more than a year after the treatment. We cannot conceive of a rationale for effectively shortening the limitation period based upon Whirlpool's failure to pay its bills in a timely manner.

Moreover, Whirlpool's argument does not address the October 26, 2006 payment to Dr. Newman for services rendered on June 1, 2006. Ms. Watley testified that she sought treatment for pain at a local emergency room on that date. There is no evidence that the payment was for any other purpose. Based upon these considerations, we conclude that Ms. Watley's benefit review conference request was filed within the time period provided by section 50-6-203(b)(2).

Ms. Watley further contends that the content of her benefit review conference request was sufficient to satisfy the statute of limitations, even though it alleged a gradual, rather than an acute, injury and did not contain the correct injury date. In support of that allegation, she relies on the general rules of liberality applicable to workers' compensation pleadings and argues that an even more liberal standard should apply to administrative filings made prior to initiation of a lawsuit. She cites Cunningham v. Hembree, in which our Supreme Court noted "the technicalities of the common law are abolished, whether in respect of the forms of pleading, the rules respecting parties, or the rules of evidence." 257 S.W.2d 12, 14 (Tenn. 1953) (emphasis omitted) (quoting Hartwell Motor Co. v. Hickerson, 26 S.W.2d 153, 157 (Tenn. 1930)). She also points to Mathenia v. Milan Seating Sys., 254 S.W.3d 313 (Tenn. Workers' Comp. Panel 2007). In Mathenia, the employee alleged that she had sustained an acute injury on a specific date. Id. at 320. Her employer contended that her injury, if any, was gradual and that the last day worked was the appropriate date of injury. Id. The date of the injury was important in that case because it determined whether the injury was subject to the six times impairment "cap" contained in Tennessee Code Annotated section 50-6-241(d)(2). Id. at 320-21. Although Mathenia is not directly on point, it provides a useful illustration that the classification of an injury as either acute or gradual is not always cut and dried and may sometimes require thoughtful analysis. In this case, Ms. Watley sustained an acute injury on a specific date. She received some medical treatment, but continued to work and to have symptoms after being released by her authorized physician in July 2006. According to her testimony, her condition deteriorated thereafter. In July 2007,

she sought medical treatment on her own and became aware that surgery might become necessary. Her treating physician, Dr. Moran, was equivocal concerning the relationship between her employment and her spinal condition. Viewing these facts together and considering our obligation to liberally construe the workers' compensation law, we conclude that the facts alleged in Ms. Watley's October 2007 benefit review conference request were sufficient to satisfy the terms of section 50-6-203.

Impairment Rating

Whirlpool also argues that the trial court erred by including that portion of Dr. Gaw's impairment rating related to diminished range of motion in making its permanent partial disability award. It points out that the trial court found that the April 2008 fusion surgery was not related to Ms. Watley's work injury and that Dr. Gaw testified that the larger part of Ms. Watley's loss of range of motion probably occurred after that procedure. Dr. Gaw also testified, however, that the AMA Guides provide that range of motion impairment must be based upon measurements taken on the day of examination and suggested that those measurements would have had to be taken after each successive surgery in order to determine the loss of range of motion caused by each. The trial court addressed the situation in its findings:

Now, I cannot find any examination that would indicate that [range of motion impairment is] to be separated between the two surgeries. There's not medical proof that says that's apportioned between one surgery or the other. There's not any testimony that I could find that indicates that the movement was better or worse after the 2008 surgery.

The court therefore elected to include the 9% impairment attributable to lost range of motion in the impairment it used to calculate Ms. Watley's permanent disability award. The evidence before the court consists of three similar statements made by Dr. Gaw. The first is that "[Ms. Watley] had a 9 percent impairment due to loss of movement." The second is "I think she had a 9-degree impairment due to loss of motion." Dr. Gaw's written report states, "Due to loss of movement of the lumbar spine, per Pages 407-409, Tables 15-8 and 15-9, she retains 9% PPI to the Whole Person." Dr. Gaw also testified that "[Ms. Watley] has a remarkable good range of motion for someone that has had three surgeries." Dr. Gaw stated that Ms. Watley reported she was little better after the two surgeries performed by Dr. Moran, than she was before them. The pages and tables of the AMA Guides, referred to by Dr. Gaw, were not made a part of the record. Based upon this record it is possible Ms. Watley would be entitled to 9 % impairment for the loss of any range of motion as Dr. Gaw's testimony seems to suggest. Dr. Gaw's description of Ms. Watley as having a good range

of motion, indicates she may have been in the minimum category for awarding impairment on that basis. In our view, the evidence before the trial court was sufficient for the finding of a permanent impairment based upon a loss of range of motion as a result of the October 2007 surgery. Because the criteria used to determine impairment was not made a part of the evidence, we are unable to conclude, after a careful examination of the record, that the evidence preponderates against the finding of the trial court of a 9 % impairment based upon loss of range of motion.

Causation of April 2008 Surgery

Ms. Watley argues that the trial court erred by finding that the fusion surgery performed by Dr. Moran in April 2008 was not related to the May 2006 injury. She relies upon her own testimony that she had pain in both legs following the injury, and some references in the medical records are consistent with that testimony. However, Dr. Moran testified that, based upon the symptoms reported to him by Ms. Watley both before and after the October 2007 discectomy, he considered it a “stretch” to find a causal connection between the initial injury and the second procedure. Dr. Gaw’s testimony was somewhat more favorable to Ms. Watley on this issue. However, we cannot fault the trial court for choosing to accept Dr. Moran’s conclusion on this issue. It is generally within a trial court’s discretion to choose which expert to accredit when there is a conflict of expert opinions. Kellerman v. Food Lion, Inc., 929 S.W.2d 333, 335 (Tenn. Workers’ Comp. Panel 1996); Johnson v. Midwesco, Inc., 801 S.W.2d 804, 806 (Tenn. 1990).

Meaningful Return to Work

Finally, Ms. Watley takes issue with the trial court’s finding that her award of permanent disability benefits was limited to one and one-half times the impairment rating because she voluntarily retired. She contends that her retirement was reasonably related to her injury, and the cap contained in Tennessee Code Annotated section 50-6-241(d)(1)(A) therefore does not apply. The courts of our state have adopted the concept of the “meaningful return to work” to determine whether or not the cap applies to a particular case. In Tryon v. Saturn Corp., 254 S.W.3d 321 (Tenn. 2008), our Supreme Court examined the many cases which had considered the subject. It then established the analytical framework to be used in determining whether or not a meaningful return has occurred:

When determining whether a particular employee had a meaningful return to work, the courts must assess the reasonableness of the employer in attempting to return the employee to work and the reasonableness of the employee in failing to either return to or remain at work. The determination of the reasonableness of the actions of the

employer and the employee depends on the facts of each case.

As a result of extensive litigation over the concept of “meaningful return to work” in the context of claims for permanent partial disability benefits, we have the benefit of many decisions in which this Court and the Appeals Panel have addressed whether a particular employee has had a meaningful return to work. These decisions provide that an employee has not had a meaningful return to work if he or she returns to work but later resigns or retires for reasons that are reasonably related to his or her workplace injury. Accordingly, the multiplier in Tenn. Code Ann. § 50-6-241[(d)(2)] is applicable. If, however, the employee later retires or resigns for personal reasons or other reasons that are not reasonably related to his or her workplace injury, the employee has had a meaningful return to work which triggers the [one] and one-half multiplier allowed by Tenn. Code Ann. § 50-6-241[(d)(1)].

Id. at 328-29 (internal citations omitted).

In the present case, Ms. Watley points to her own testimony that she chose to retire rather than accept a position on the BIR line because she believed her injury would have prevented her from performing the job. Her testimony is supported by her statement to Dr. Moran that she “quit her job . . . because of severe lumbar pain.” As the trial court noted in its findings, however, she made that decision on her own. Neither Dr. Moran nor any other physician had advised Ms. Watley to retire or consider retirement. She had been under Dr. Moran’s care for only a few weeks at the time she made the decision. She was contemplating surgery, but that had not occurred. The outcome of her medical treatment was unknown to her or to Dr. Moran. In our view, although there was some evidence to the contrary, the trial court’s finding that Ms. Watley’s retirement was not reasonably related to her injury was amply supported by the evidence in the record.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Whirlpool Corporation and its surety, for which execution may issue if necessary.

DONALD P. HARRIS, SENIOR JUDGE

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**Circuit Court for Rutherford County
No. 56935**

No. M2010-02125-WC-R3-WC - Filed - September 8, 2011

JUDGMENT

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference.

Whereupon, it appears to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs will be paid by Whirlpool Corporation and its surety, for which execution may issue if necessary.

PER CURIAM